

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MICHAEL ISIDORO SANCHEZ,
Petitioner.

No. 2 CA-CR 2019-0272-PR
Filed June 11, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Cochise County
No. CR201300346
The Honorable Timothy B. Dickerson, Judge

REVIEW GRANTED; RELIEF GRANTED

Michael I. Sanchez, Kingman
In Propria Persona

STATE v. SANCHEZ
Decision of the Court

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

BREARCLIFFE, Judge:

¶1 Michael Sanchez seeks review of the trial court’s ruling summarily dismissing his notice of post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.¹ We grant review and relief, and we remand the case to the court to allow Sanchez to file a petition raising his claim of newly discovered evidence.

¶2 Sanchez pleaded guilty to sexual conduct with a minor under the age of fifteen and attempted sexual conduct with a minor under the age of fifteen. The trial court sentenced him to a twenty-five-year prison term for the first count and, for the second, suspended the imposition of sentence and placed him on lifetime probation. Sanchez has sought and been denied post-conviction relief at least four times; this court has denied relief on review on three occasions; Sanchez did not seek review of the trial court’s denial of a petition filed in October 2016. *State v. Sanchez*, No. 2 CA-CR 2018-0224-PR (Ariz. App. Oct. 12, 2018) (mem. decision); *State v. Sanchez*, No. 2 CA-CR 2017-0123-PR (Ariz. App. July 14, 2017) (mem. decision); *State v. Sanchez*, No. 2 CA-CR 2015-0359-PR (Ariz. App. Dec. 22, 2015) (mem. decision).

¶3 In September 2019, Sanchez filed a notice of post-conviction relief indicating he was raising claims of newly discovered material facts and ineffective assistance of counsel. He asserted he had “just obtained” medical examinations of the victims, asserting they had been “withheld by the State” and that his previous attorneys had “failed to obtain” them. He attached to his notice forensic examination reports for both victims. Each

¹ Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments apply to all cases pending on the effective date unless a court determines that “applying the rule or amendment would be infeasible or work an injustice.” *Id.* Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

STATE v. SANCHEZ
Decision of the Court

report indicated a lack of injuries to the victims' genitals but noted that genital penetration "can occur without causing injuries to the genitals."

¶4 The trial court summarily dismissed the petition.² It concluded, based on Sanchez's filings related to the October 2016 petition, that Sanchez had previously been aware "of the contents of the report[s]" and that they therefore were not newly discovered evidence. It also determined the reports were not exculpatory, noting "[t]he lack of observable damage to the victims is not evidence that [Sanchez] did not commit the offenses to which he plead[ed] guilty." Thus, the court concluded, because Sanchez "did not provide reasons" he did not raise this claim in his previous post-conviction proceeding, he was precluded from raising the claim now. This petition for review followed.

¶5 On review, Sanchez argues the trial court erred by concluding the reports were not exculpatory and not newly discovered. He also asserts the report "triggers a newly discovered" claim of ineffective assistance of counsel. A defendant is permitted to raise a claim of newly discovered evidence in a successive and untimely proceeding like this one. Ariz. R. Crim. P. 33.2(b), 33.4(b)(3)(B). The defendant's notice, however, must "explain the reasons for not raising the claim in a previous notice or petition" or the trial court may summarily dismiss the notice. Ariz. R. Crim. P. 33.2(b). Rule 33.2(b) also permits a trial court to dismiss a notice if the identified claims are precluded by Rule 33.2(a)(2) because they had already been adjudicated.

¶6 Sanchez argues that the trial court erred by concluding he had been aware of the content of the report such that he could have raised this claim sooner. The court referred to Sanchez's October 2016 petition and his reply to the state's response to his motion for rehearing following the court's summary dismissal of that petition. In the 2016 petition, Sanchez referred to a police report indicating the victims had been examined and asserted the state had withheld reports of those examinations from his counsel. He "affirm[ed]" those examinations would show "negative results," including a lack of injury to the victims' genitals, "because he did not commit those crimes." He claimed the examination reports constituted newly discovered evidence. In the reply, Sanchez focused on police interviews with the victims, noting that neither victim had reported any pain or injury related to their genitals.

²The court also vacated an earlier order that appointed counsel.

STATE v. SANCHEZ
Decision of the Court

¶7 Although the purported contents of such reports are generally described in the filings identified by the trial court, we agree with Sanchez that the filings do not demonstrate that he had previously seen or had access to the reports themselves. Instead, they appear to reflect only that he believed those reports would be consistent with the victims' statements to police about their lack of genital injuries and with his own belief that he could not have committed the charged acts without having injured the victims' genitals. And Sanchez complied with the requirement in Rule 33.2(b) that he "explain the reasons for not raising the claim in a previous notice or petition" by stating he had only recently obtained copies of the reports.

¶8 A trial court is empowered to summarily dismiss a petition that includes claims that are facially without merit – that is, claims that do not "present[] a material issue of fact or law that would entitle the defendant to relief." Ariz. R. Crim. P. 33.11(a). But the rule does not contemplate the dismissal of apparently non-meritorious claims before a defendant files that petition. A court may dismiss a notice only if the claims identified in that notice are precluded or untimely, or if the defendant has not complied with Rule 33.2(b). And, although a court may summarily dismiss a petition for the failure to provide "sufficient reasons" for not raising the claim in a previous petition, the court here did not dismiss the notice on that basis. Ariz. R. Crim. P. 33.2(b). Because Sanchez complied with Rule 33.2(b) and presents these reports for the first time, it was premature for the trial court to evaluate the underlying merits of his claim. That is, without giving Sanchez the opportunity to file a petition, it could not yet address whether he had met the requirements of Rule 33.1(e), that the reports "probably would have changed the judgment or sentence" and were discovered after sentencing, and that Sanchez was diligent in discovering them.

¶9 Sanchez is incorrect, however, that he is entitled to raise a new claim of ineffective assistance of counsel. Rule 33.1(e) does not contemplate a claim of newly discovered evidence of ineffective assistance of counsel. Instead, that rule is limited to "newly discovered material facts . . . [that] probably would have changed the judgment or sentence." Ariz. R. Crim. P. 33.1(e); see *State v. Amaral*, 239 Ariz. 217, ¶ 9 (2016) (listing five requirements for claim of newly discovered evidence). A claim of ineffective assistance of counsel falls under Rule 33.1(a), see *State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010), and is precluded and untimely in this successive proceeding, see Ariz. R. Crim. P. 33.2(a), 33.4(a)(3)(A).

STATE v. SANCHEZ
Decision of the Court

¶10 We grant review and relief. We remand the case to the trial court to allow Sanchez to file a petition arguing his claim under Rule 33.1(e).